(15)

No. 87-1555

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES H. BURNLEY, IV, SECRETARY
DEPARTMENT OF TRANSPORTATION, ET AL.
PETITIONERS

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, ET AL.
RESPONDENTS

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF BENDINER-SCHLESINGER LABORATORY, THE AMERICAN INSTITUTE FOR DRUG DETECTION, AND THE NATIONAL SUBSTANCE ABUSE CONSULTANTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it determined that the Federal Railroad Administration drug testing regulations were unreasonable in scope because the test results are incapable of detecting drug intoxication or impairment and because the results are unreliable.

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INTEREST OF AMICI CURIAE

Since 1843, *Amicus Curiae,* Bendiner and Schlesinger, Inc., has been providing high quality medical services. The toxicology department laboratory provides drug testing services to clients throughout New York State and is certified under Title XVIII of the Social Security Act, which is administered by the federal Department of Health and Human Services. This certification includes periodic inspections of the laboratory and participation by the laboratory in a proficiency testing program. The laboratory is fully licensed for forensic toxicology by the state of New York.

Amicus Curiae, American Institute for Drug Detection, (AIDD), with facilities located in Rosemont, Illinois, and Dallas, Texas, is a forensic toxicology laboratory licensed in the states of Illinois and Texas and certified under Title XVIII of the Social Security Act. AIDD is an accepted participant in both the National Institute on Drug Abuse (NIDA) laboratory certification program and the College of American Pathology (CAP) laboratory accreditation program.

Amicus Curiae, National Substance Abuse Consultants, Inc.,is a national network of affiliated attorneys and professional consultants from the various disciplines which impact substance abuse in the workplace and on college campuses. NSAC has counseled local, state, and federal governments, businesses of all sizes, and colleges, regarding all aspects of confronting substance abuse including detection, prevention, intervention, policy and procedure development, employee assistance and student assistance programs, treatment and the law.

Amici believe that their experience and expertise will be of assistance to the Court in this case.[1]

FACTUAL SUMMARY

This matter is before the court on a grant of a writ of *certiorari* (June 6, 1988), appealing the Ninth Circuit Court of Appeal's reversal of the District Court's grant of summary judgement to Petitioner, the Secretary of the Department of

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[1] Pursuant to Rule 36 of the Court's Rules, the parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of this Court,

Transportation (839 F. 2d 575). At issue is the Railway Labor Executives' Association (R.L.E.A.) challenge to the Federal Railway Administration (FRA) regulations mandating blood and urine tests of railroad employees. The challenge arises under the search and seizure clauses of the fourth amendment.

Determining that the drug tests constitute a fourth amendment search, the Ninth Circuit concluded that "particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception." (839 F.2d,587). The court based this conclusion primarily upon its determination that, because railroad employees are historically not the focus of FRA Regulations, the "administrative search exception" to the fourth amendment's warrant requirement does not apply (839 F. 2d, 585). Therefore, absent individualized suspicion, the required drug tests failed to satisfy the first prong of the two-prong fourth amendment reasonableness test which requires that a search be justified at its inception.

The Ninth Circuit further concluded that the testing program was not reasonably related to the "professed purpose" of the tests , "because the tests cannot measure current drug intoxication or degree of impairment." (839 F. 2d, 588). The FRA Regulations requiring drug tests did not, therefore, satisfy the second prong reasonable-in-scope requirement of the fourth amendment standard.

SUMMARY OF ARGUMENT

Amici take issue before this Court with the Ninth Circuit's finding that the FRA drug testing program was unreasonable in scope . It is Amici's position that the Ninth Circuit's preoccupation with the issue of impairment resulted in its misinterpretation of the FRA primary purpose in issuing the challenged regulations. The Court mistakenly concluded that the FRA purpose for issuing the drug testing guidelines was to detect current drug intoxication and impairment of railroad employees. However, it is evident from the court's own account of the Regulations' development that employee and public safety were paramount. 839 F.2d, 589.

Because the Ninth Circuit misunderstood the primary purpose of the regulations, it declared the drug test results to be unreliable in detecting drug intoxication or employee impairment. The Court concluded that the FRA program, based upon such test results, is unreasonable in scope. Oddly, the Ninth Circuit found that these same test results, when combine with individualized suspicion "should withstand scrutiny under the scope prong of the reasonableness standard" and "would provide a sound basis for appropriate disciplinary action." 839 F.2d, 589 .

Amici urge this Court to recognize that it is generally acknowledged among forensic toxicologists that current drug test methodologies, properly utilized, can accurately and reliably detect recent drug use. Neither the toxicology methods employed nor test reliability depend upon the manner in which an individual is selected (randomly, during scheduled medical examination or based upon individualized suspicion). Likewise, the testing methods utilized in the laboratory will not be altered depending upon the nature of employer discipline imposed in response to the results.

The Ninth Circuit improperly allowed its preoccupation with impairment to color its judgement. The court failed to recognize that the common carrier employer has a right and a duty to take all necessary steps to ensure the safety of employees and the public and to protect its property. Drug tests, conducted pursuant to an otherwise legally defensible substance abuse program, are reliable and reasonably related to the common carrier's safety goals.

This Court is urged to recognize the Ninth Circuit's error and to acknowledge the scientific communities' general acceptance of the testing methods involved.

ARGUMENT

I. THE NINTH CIRCUIT'S DETERMINATION REGARDING THE REASONABLENESS OF FRA REGULATION SECTION 219 WAS IN ERROR.

A. WHEN DETERMINING THE REASONABLENESS OF THE FRA DRUG TESTING PROGRAM, THE COURT IGNORED OR MISUNDERSTOOD RELEVANT SCIENTIFIC PRINCIPLES.

The Ninth Circuit determined that urinalysis mandated or authorized by the FRA regulations constitutes a search under the fourth amendment to the United States Constitution [2]. As such, the drug tests must satisfy both prongs of the well established two-prong fourth amendment reasonableness test; first, the search must be "justified at its inception ; and second, the search as actually conducted must be "reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)) The Ninth Circuit found that the FRA authorized drug tests [3] failed both prongs of this two-prong test. First, drug testing is not

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2 The Fourth Amendment to the United States Constitution states, in relevant part:

> "The right of the people to be secure in their persons, houses, papers and effects , against unreasonable searches and seizures, shall not be violated..."

(U.S. Constitution, amend. IV)

3 It is noted that the FRA Regulations challenged by RLEA also authorize blood-alcohol testing under the same circumstances which might give rise to urinalysis for drug use. Because the Ninth Circuit did not specifically address the blood-alcohol tests, *Amici* will limit their discussion to the court's conclusions regarding drug testing.

justified at its inception absent individualized suspicion. Second, the drug tests were not reasonably related to the purpose of the FRA drug testing program "because the tests cannot measure current drug intoxication or degree of impairment." 839 F.2d, 588 .

The court then concluded, however, that these same drug tests would be appropriate and "would provide a sound basis for appropriate disciplinary action" when combined with individualized suspicion. 839 F. 2d, 589. The court's reasoning reflects a misunderstanding of both the purpose of the FRA drug testing program and the scientific principles involved. [4]

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4 Although *Amici* limit their present discussion to the Ninth Circuit's erroneous determination of the scope and reliability of the drug tests, we nonetheless note our support for the FRA position that the testing program was reasonable at its inception. The FRA regulations are not ultimately intrusive. Subpart 219, (49 CFR Part 219) does not mandate or authorize random testing of employees. Moreover, *Amici* submit that the Ninth Circuit committed reversible error when it concluded that the "administrative search exception" to the fourth amendment did not apply. *Amici* urge this Court to adopt the conclusion and reasoning of the Third Circuit Court of Appeals in its June 21, 1988 decision, ***Policeman's Benevolent Association of New Jersey, Local 318 et al..v. The Township of Washington,*** ____ F.2d. ____, 3 IER Cases (BNA) 699, 704 (June 21, 1988), in which the court found the "administrative search exception" applicable to a random drug testing program. Accord,

1. THE PURPOSE OF FRA SECTION 219

As discussed in the Solicitor General's petition for writ of *certiorari* before this court, the principal purpose of the challenged regulations is to ensure employer and public safety. That purpose and the evidence supporting the need for the challenged regulations will be adequately discussed by the Solicitor General before this court. *Amici* will not attempt to expand upon the Government's position but note our concurrence. It was the court's misunderstanding of the

Rushton v. Nebraska Public Power District, _____F.2d. _____, 3 IER Cases (BNA) 257 (8th Cir. April 14, 1988);*National Treasury Workers Union v. Von Rabb* 816 F.2d. 170 (5th Cir. 1987), stay denied, 107 S.Ct. 2479 (1987) cert. granted 56 U.S.L.W. 3590, (Feb 29, 1988); *Division 241 A.T.U. v. Suscy*, 538 F. 2d, 1264 (7th Cir. 1976), cert. denied 429 U.S. 1029 (1976). *McDonell v. Hunter*, 809 F.2d. 1302 (8th Cir. 1987) The Ninth Circuit denied the application of this exception after concluding railroad employees were not the focus of the FRA Regulatory scheme. However, it is certain that all railroad employees clearly play a vital role in transportation safety. Anyone who denies the significance of that role or that operating employees are the focus of the FRA Regulatory scheme does so at a distance from reality. See, *Jones v. McKenzie*, 833 F.2d. 335 (D.C. 1987), petition for *certiorari* filed, 56 U.S.L.W. 2303. (where the Court stated that it would be "patently irresponsible" for school officials to ignore suggestions of drug use among transportation department employees and that drug testing aimed at ensuring safety of students was a strong government concern; the court stated that any suggestion to the contrary "would be preposterous".)

Regulatory safety purpose which led, in part, to the erroneous conclusion that the test methods are unreliable and unreasonable in scope.

2. THE SCIENTIFIC PRINCIPLES OF DRUG TESTING

Like many others faced with determining drug testing issues, the Ninth Circuit was misled into a discussion of drug impairment. That issue is raised by those philosophically opposed to drug testing as a means of diverting attention away from the fact that use of a prohibited substance has been detected[5].

Not even opponents of drug testing, however, deny that current forensic procedures, such as those required by the

[5] Many opponents of drug testing have even suggested that drug tests are a subterfuge to criminal law enforcement. See Wisotsky, *The Ideology of Drug Testing*, 11 NOVA L. Rev. 763, 764. Yet *Amici* are unaware of any drug testing program in the school or employment setting which provides for test results to be forwarded to the criminal prosecuting authority. On the contrary, most regulations, statutes and employer programs specifically prohibit such action. See, Manditory Federal Guidelines for Federal Workplace Drug Testing Programs, DHHS, 53 Fed. Reg. 11986; Minnesota Ch. 388 L. 1987, §181.954 (4).

Mandatory Federal Guidelines (53 Fed. Reg. 11970-11989) and the instant FRA Regulations, are sufficiently accurate and sensitive to detect the ingestion of prohibited substances at some recent prior time (McBay, *Urine Testing For Marijuana Use*, 249 J.A.M.A. 881 (1983); Dubowski, *Drug -use Testing: Scientific Perspectives*, 11 Nova L. Rev. 415, 509, 548-549 (Winter 1987); See also, Boone, *Reliability of Urine Drug Testing*, Q and A, 258 J.A.M.A. 2587 (1987). It is also universally acknowledged that the technology of screening for drugs in urine has greatly improved in recent years. (Council Report, *Scientific Issues In Drug Testing*, 257 J.A.M.A. 3110 June 1987)."The goal of urine drug testing may be stated as the reliable demonstration of the presence, or absence, of specified drugs or metabolites in the specimen-that is, the production of a valid positive or negative result." Blanke, "Accuracy In Urinalysis," NIDA Research Monograph 73 (1986); DHHS Publication Number (ADM) 87-1481.

A clear understanding of drug testing requires comprehension of the relevant laboratory procedures, the results and the probative value of those results.

a. Laboratory Procedures

Basically, urine [6] can be analyzed by a number of methods, including immunoassays, thin-layer chromatography, gas chromatography, high performance liquid chromatography and gas chromatography/mass spectrometry (GC/MS). Introduction to Forensic Toxicology, Cravey and Baselt ,eds., Biomedical Pub. (1981). The laboratory procedures used to analyze urine for drugs are divided into two phases: screening tests and confirmatory tests.

The most widely accepted technique used to screen urine for drugs are immunoassays. These techniques are based on the ability to produce antibodies to various drugs. (Council Report, *Scientific Issues in Drug Testing*, 257 J.A.M.A. 3110, 3112 (June 1987) hereinafter cited as "Council Report"). Immunoassays are based on the principle of competition between the labelled and unlabeled drug for

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6 Drugs are eliminated from the body through metabolism and excretion as either unchanged drug or as metabolities (a compound produced from chemical changes of a drug in the body) through urine, bile, sweat, saliva and expired air. In general, drug in the urine is more concentrated than other bodily fluids such as plasma. See, Chiang, *Implications of Drug Levels in Body Fluids: Basic Concepts*, 73 NIDA Research Monograph 62, 69-71 (1986).

binding sites on a specific antibody. (Hawks, *Analytical Methodology*, 73 NIDA RESEARCH MONOGRAPH 30 (1986) hereinafter cited as "Hawks"). Antibodies are protein substances with sites on their surfaces to which specific drugs or drug metabolites will bind. The two most commonly employed immunoassay techniques are the "Radioimmunoassay" and the "Enzyme-multiplied immunnoassay technique" ("EMIT"). Council Report, at 3112.

Radiommunoassay is based on the principle that a drug labelled with a radioactive substance competes for the antibody binding site with the same drug not labelled with a radioactive substance. The more unlabeled drug there is in the sample, the less radioactive drug binds to the antibody. Council Report, at 3112. Known amounts of radioactive-labelled drug are added to a urine sample with known amounts of antibodies. The mixture is allowed to incubate during which time the labelled drug and unlabeled drug compete for binding sites on the antibody. A gamma counter is then used and the presence or absence of a drug is indicated by the amount of radioactivity found. A positive specimen is identified when the radioactive

count is equal to or greater than those of a positive control prepared in the same manner as that of the unknown urine. Hawks, at 30-31.

EMIT is used more commonly than the RIA technique. In the EMIT assay,the label on the antigen (drug) is an enzyme (protein) that produces a chemical reaction for detection of drugs. This detection is based on the competition between unlabeled drug or drug metabolite and labelled drug or drug metabolite for binding sites on the antibody. The drug in the subject's urine competes for the limited number of antibody binding sites and thereby proportionally increases the total enzyme activity. The enzymatic activity is, therefore, directly related to the concentration of the drug present in the urine. Hawks, at 31.

It is generally agreed that all specimens screened "positive" must be confirmed by some scientific method other than that used to screen. See, Hawks, at 30; Council Report, at 3113; Boone, *Reliability of Urine Drug Testing:* Q and A, 258 J.A.M.A. 2587; Hoyt, *Drug testing In the Workplace - Are Methods Legally Defensible?* 258 J.A.M.A. 504 (1987) hereinafter cited as "Hoyt". The consensus confirmatory

method is through chromatography. Hoyt, at 509. Chromatography is a method of analysis in which the various compounds in a biological specimen can be separated by a partitioning process. This process requires, (1) a stationary phase, which may be a solid or a liquid on an inert support having a large surface area and (2) a mobile phase of liquid or gas. Substances are carried by the mobile phase through a column or across a plate, where the stationary phase interacts with the specimen to cause a separation of the various components. After separation, a detection method distinguishes the components for identification and measurement. Separation of the components of the specimen mixture containing substances of various molecular types is based on the time spent by each component in each phase (stationary and mobile) of the chromatographic system. Hawks, at 32.

Several chromatographic techniques exist including thin-layer chromatography (TLC) gas-liquid chromatography (GLC) and high-pressure liquid chromatography (HPLC). It is generally agreed among forensic scientists however that the combination of GLC with the detector, mass spectrometry

(MS) is the most specific and sensitive method available. Hoyt, at 507.

Gas chromatography/mass spectrometry (GC/MS) combines the chemical separating power of the gas chromatograph with the molecular identifying power of the mass spectrometer. The gas chromatograph separates the compound and the mass spectrometer breaks it down into electrically charged ion fragments. "Different compounds break down into different fragment patterns and, like fingerprints, no two fragment patterns are alike." Council Report at 3113; Hawks, at 35.

b. The Procedure Results

It is generally agreed among forensic toxicologists that a specimen screened positive by an immunoassay technique and confirmed positive by GC/MS provides presumptive evidence of recent past use. Hawks, at 36; Manno, *Interpretation of Urinalysis Results* 73 NIDA Research Monograph 54 (1986); Ellis, *Excretion Patterns of Chronic Cannabinoid Users*, 38 Clin. Pharm. & Ther. 572 (November 1 985); McBay, *Urine Testing for Marijuana Use*, 249 J.A.M.A. 881; Dubowski, at

548-549; Introduction to Forensic Toxicology, Cravey and Baselt, eds. (Biomedical Publications California 1981, hereinafter cited as "Cravey".) How those results shall be used by employers or in a court proceeding are a concern to the forensic scientist only to the point of explaining the manner in which the tests results were reached. Cravey, at 152 So long as the forensic scientist can establish that the methods and procedures employed in adducing the result were performed and followed in accordance with the generally accepted standards of the discipline in question, the test results should be allowed as evidence.(Fed. R. Ed. 401, 402, 702.)

What the Ninth Circuit failed to recognize is that there exists unanimity among forensic scientists, including those philosophically opposed to drug testing employees, (McBay, *Drug Analysis Technology--Pitfalls and Problems* 33 Clin Chem. 33 B-39b (1987)) that immunoassay results, confirmed by another more sensitive scientific method is accurate and reliable in detecting drug use. The FRA regulations in issue here require immunoassay screening, confirmed by another more sensitive scientific method. Contrary to the Ninth

Circuit's conclusion, such methods are reliable. See *Rushton v. Nebraska Public Power District*, 653 F. Supp 1510 (D. Neb. 1987), aff'd 3 IER Cases (BNA) 257 (8th Cir. April 14, 1988); *National Treasury Workers Union v. Von Raab*, 816 F. 2d, 170 (5th Cir 1987), cert granted 108 S. Ct. 1072 (1988).

II. THE FRA REGULATORY SCHEME IS LEGALLY DEFENSIBLE

Defensibility of a drug testing program depends not only upon the reliability of the analytic procedure utilized but compliance with several other factors including demonstration of employer need for drug testing, adoption by the employer of a comprehensive program which includes rehabilitation, notice of testing provided to applicants and employees, adoption of written policy and procedures, adoption of proper chain-of-custody procedures, proper written record keeping procedures, laboratory quality assurance and quality control programs, retention and use of qualified laboratory personnel, adoption and compliance with confidentiality procedures and

result reporting requirements and retention of specimens to permit independent testing.

1. The employer must establish a need for an anti-drug program:

In *Caruso v. Ward* 131 N.Y. Ad. 2d 214, 520 N.Y.S. 2d 551 (AD 1, Dept. 1987), the court held that police officers could not be randomly tested for drugs without some overriding governmental interest. Such interest did not exist where there was no showing of a drug problem among the police officers to be tested, and where there were statistics showing that few police officers had tested positive for drugs is the past. But see, *Policeman's Benevolent Association of New Jersey, Local 318 v. Township of Washington* , 3 IER Cases BNA 699 (3d Cir. 1988). *Amici* submit that in the instant case a need for drug testing railroad employees has been established. See *Burnley v. R.L.E.A.*, Petition for Writ of Certiorari (87-1555) from the U.S. Court of Appeals for the Ninth Circuit No. 87-1555, March 1988 at 2-4). See also, *Division 241 A.T.U. v. Suscy*, 538 F2d 1264, 1267, (7th Cir.), cert denied, 429 U.S. 1029 (1976).

A need for an anti-drug program can be established by statistics such as those regarding drug related accidents and employee theft, health, disability, or by public safety concerns found in individual work settings.In this case, such needs are not hard to document. Opinion polls of employees show that they recognize the need for drug testing. USA Today Survey, (March 1986). A general opinion poll conducted by the Gallop Organization indicated that most Americans favor testing all employees for drug use. *Down on Drugs: A Newsweek Poll*, Newsweek, August 11, 1986 p. 16. Another poll found that 69 percent of the employee-respondents favored periodic drug testing by their company, and 81 percent were willing to take a drug test even if they could refuse. Lamar, *Rolling Out the Big Guns: The First Couple and Congress Press the Attack on Drugs*, Time, September 22, 1986, p. 26; *Most Favor Mandatory Testing, Poll Concludes*, The Davis Enterprise, September 15, 1986, p. 2.

As the above polls indicate, employees realize that a co-worker's drug use can pose a serious problem to workplace

safety and productivity. Drug use threatens the viability of their companies and, thus, ultimately threatens their jobs.

Even some legal commentators who are generally not in favor of drug testing concede that public safety concerns may establish a need for,or at least legitimize, drug testing. Comment, *Constitutional Law: Urinalysis and the Public Employer - Another Well Delineated Exception to the Warrant Requirement?* 30 Okla. L. Rev. 257, 171-72 (1986); Higginbotham, F.B.I. L. Enf. Bull, at 25, 28; Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework,* 11 Employee Rel. L. J. 422, 423 (1985):

2. The employer should have a comprehensive anti-drug program which includes rehabilitation:

In *Shoemaker v. Handel,* 795 F. 2d, 1136 (3 Cir. 1986) cert denied, 107 S. Ct. 577 (1986), the lower federal court upheld the New Jersey Racing Commission's drug testing program for jockeys, in part, because rehabilitation was offered to jockeys who test positive for drugs. Various proposed or enacted state statutes, and President Reagan's 1986 Executive Order "Drug Free Federal Workplace", provide some form of substance abuse evaluation or

rehabilitation as an alternative to serious discipline if an employee tests positive. Executive Order, No. 12,564, 51 Fed. Reg. 32889 at 32889. As examples of current state laws see, Iowa, Sec. 7305, HF 469, L. 1987, effective July 1, 1987; Minnesota, Paragraphs 181. 950-957, effective September 1, 1987; Utah, Utah Code Annotated, Sec. 34-38-1, effective 1987; Vermont, Vermont Annotated T-21 Sec. 511, effective September 1987; for pending bills see, Maine, Bill L.D. 156; California, Senate Bill No. 1611; New Jersey, Assembly Bill 2850.

Rehabilitation may begin with the referral of an employee to an evaluation and treatment program initiated through a company employee assistance program (EAP). Evans, *Drug Testing, Work performance, and EAPs: Recent Legal Guidelines*:, The Almacan, (December 1986) at 33. Although rehabilitation is desirable,it must be noted that a positive drug test result does not, *per se*, prove that the employee is an addict, and thus handicapped. The test shows drug use, not addiction. Current drug users are not entitled to handicapped protection. 29 USC Sec. 706 (7) (B); 29 USC 793 and 794.

McCleod v. City of Detriot, 39 FEP Cases 225 (ED. Mich. 1985); *Heron v. McGuire* 42 FEP Cases 31 (2d Cir. 1986); *Copeland v. Philadelphia Police Dept.* No. 87-1256 (3rd Cir. March 7, 1988). The Federal Railroad Administration regulations provide an opportunity for evaluation and counseling. 49 CFR 219.401.

3. The employer should provide employees with proper notice, in the form of a written policy, prior to the implementation of a drug testing program:

This guideline was affirmed in the case of *Capua v. City of Plainfield* , (643 F. Supp. 1507 D.N.J. 1986) where city officials conducted a surprise drug test on firefighters and police. The court held that before a drug testing program is implemented, its existence must be made known, its methods clearly enunciated, and its procedural and confidentiality safeguards adequately provided for. See also *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Feliciano v. City of Cleveland*, 661 F.Supp. 578 (N.D. Ohio 1987). Employees who may be required by an employer to submit to a drug test should be provided a written policy statement which contains:

(a) A general statement of the employer's policy on employee drug use which will include identifying both the grounds on which an employee may be required to submit to a drug test and the actions the employer may take against an employee on the basis of a positive confirmed drug test result or other violation of the employer's drug use policy (see, 49 CFR 219.201 and 219.301);
(b) A general statement concerning confidentiality ;49 CFR 214.403 (b) (2); 53 Fed. Reg. 11986.
(c) Procedures for how employees can confidentially report the use of prescription or non-prescription medications prior to being tested;49 CRR 219.309 (b) (2) ; 53 Fed. Reg. 11985-6;
(d) Circumstances under which drug testing may occur and a description of employment positions which will be subject to testing on a reasonable suspicion, random, or other basis. (see, 49 CFR 219.201 and 219.301);
(e) The consequences of refusing to submit to a drug test. (see, 49 CFR 219.213 and 219.505);
(f) Information regarding opportunities for assessment and rehabilitation if an employee has a positive confirmed test result. (49 CFR 219.405)
(g) A statement that an employee who received a positive confirmed drug test result may explain or contest the accuracy of that result, (49 CFR 219.211 and 219.503; 53 Fed. Reg. 11985).
(h) A list of all drugs for which the employer might test. Each drug should be described by its brand name or common name, as applicable, as well as its chemical name. (see, 49 CFR 219.101,219.501(c) and 219.501, and 53 Fed. Reg. 11980.);
(i) A statement regarding any applicable collective bargaining agreement or contract.

An employer should post the notice in an appropriate and conspicuous location on the employer's premises and copies

of the policy should be available for inspection by employees during regular business hours.

An employer who conducts job applicant drug testing should notify the applicant, in writing, upon application and prior to the collection of the specimen, that the applicant may be tested for the presence of drugs or their metabolites. (See, 49 CFR 219.501 (b)).

4. The employer should have written specimen collection procedures that preserve the probative value of the specimen:

FRA Regulations (49 CFR 219) and applicable Mandatory Federal Guidelines (53 Fed. Reg. 11979) meet this standard. They provide that specimen collection will be documented with procedures including the labeling of specimen containers to reasonably preclude the likelihood of erroneous identification of test results. Specimen collection, storage, and transportation to the testing site should be in a manner which reasonably precludes specimen contamination or adulteration.

49 CFR 219.204, 219.205, 219.305; and 53 Fed. Reg 11980, 11987. See also, Imwinkelried, The Methods of Attacking Scientific Evidence (Charlottesville, VA: The Michie Co. 1982) at 83, 89-90; Imwinkelried, *The Identification of Original Real Evidence*, 61 Mil. L. Rev. 145 at 159.

5. The employer and laboratory should keep records which include: chain of custody, operation and maintenance documents, records of procedures, worksheets regarding equipment operation, and quality control:

Proper record keeping ensures the probative value of a drug test result, (*United States v. Ford* , 23 MJ 331 (CMA 1987)); *United States v. Hagan* 24 MJ 571 (NMCMR 1987); *Brown v. Smith* , 505 NYS 2d 743 (Sup. 1985) and it ensures that the laboratory performs tests in a non-negligent manner. *Dornak v. Lafayette General Hospital*, 399 So. 2d 268 (La.1981); *Bulkin v. Western Kraft East, Inc.*, 422 F. Supp. 437 (E.D. Pa, 1976); and see,49 CFR 219.205, 219.307, 219.19, 2219.21; 53 Fed. Reg. 11980-11982, 11987 ; For an example of State law requirements, see Illinois Clinical Laboratory Act, Ill. Rev. Stats., ch. 111 1/2, par. 626-101 et seq.

6. Qualified laboratory personnel who are properly trained:

The FRA Regulations (49 CFR 219.307) require that all railroads testing employees must ensure that testing is undertaken only by an independent laboratory "proficient in the testing of urine for alcohol and drugs of abuse". Moreover, the laboratory employed by any railroad "shall regularly participate in an external quality control program that involves the analysis of samples submitted by a reference laboratory..." 49CFR 219.307.

Since the Ninth Circuit decision in this case on February 11, 1988, the final, "Mandatory Guidelines for Federal Workplace Drug Testing Programs" were issued. (53 Fed. Reg. 11970-11989, issued April 11, 1988). The Mandatory Guidelines require all laboratories testing covered employees to employ a qualified individual with documented scientific qualifications in analytical forensic toxicology who will assume professional, organizational, educational and administrative responsibility for the laboratory. Minimum educational and experience qualifications are set forth. (53 Fed Reg 11982). Many states also mandate strict education and experience guidelines for qualified laboratory directors and staff as a condition of initial licensing and renewal. (See, Illinois Clinical Laboratory Act , Ch. 111 1/2, par. 626 - 101; see, also CAP guidelines for forensic urine drug testing ("FUDT") laboratory accreditation program, discussed at pp. 1-2, 25-28, brief of *Amicus Curiae* , CAP, now before this

Court in *National Treasury Workers Union v. Von Raab*. 816 F.2d 170 (5th Cir. 1987) stay denied 107 S. Ct. 2479 (1987); cert granted 56 USLW 3590 (Feb. 29, 1988) (No. 86-1879).

7. Laboratory participation in accreditation, quality control, and proficiency testing programs:

The Ninth Circuit cited Professor Kurt M. Dubowski's extensive scientific discussion of drug testing (11 Nova L. Rev. 415 (1987)) in support of its finding that blood and urine tests are not reasonably related to the stated purpose of the tests. (839 F. 2d 588) One of Professor Dubowski's recommendations was that a comprehensive and universal nationwide system of regulation of non-medical drug-use testing should be established forthwith, preferably in the form of federal licensure with provisions for alternative accreditation under standards identical to those for federal licensure. Since the publication of Professor Dubowski's recommendation in 1987, the NIDA certification program (53 Fed Reg 11970-11989) and CAP accreditation program have begun. 49 CFR 219.307. Also, many state laboratory licensure requirements, such as those found under the Illinois Clinical Laboratory Act , (Ill. Rev. Stats., ch. 111 1/2 , par. 628-101 et seq.) provide

stringent controls covering such areas as capacity to test the commonly preferred classes of drugs, initial and confirmatory tests, personnel qualifications, quality assurance and quality control, security procedures and chain-of-custody requirements. In addition, they may cover specimen accession and storage , documentation, result reporting, confidentiality, and written standard operating procedures, as well as written daily and periodic preventative maintenance procedures and analytical balance certification procedures. As a practical business matter, any laboratory not participating in either NIDA or CAP programs will be driven from the competitive market. Furthermore, any laboratory not maintaining compliance with state licensing requirements will be subject to revocation proceedings. See, Illinois Clinical Laboratory Act, sec 8-101.(Ill. Rev. Stat. Ch. 111 1/2, par. 628-101.).

8. The employer and laboratory must have strict confidentiality and reporting procedures:

All information, interviews, reports, statements, memoranda, and test results, written or otherwise, received by

the employer through its drug testing program should be considered confidential communications. See 49 CFR 219.11 (c)(2); 219.403(b)(2); 219.403 (c)(1); 219.209; 219.307(c); and 53 Fed. Reg. 11987. Strict confidentiality procedures not only protect employees, they protect employers. *Houston Belt and Terminal Rigging Co. v. Wherry,* 548 S. W. 2d 743 (Tex. Civ. App. 1977) cert denied 434 U.S. 962 (1977). Although employers may have a qualified privilege to release accurate, although derogatory, information about an employee to persons who have a need to know the information, this privilege may be lost if it is released with malice, recklessness, or if the scope of the privilege is exceeded. *Turner v. Halliburton Co.,* 240 Kan. 1, 722 P. 2d 1106 (Kan. 1986); *O'Brien v. Papa Gino's of America, Inc.* 780 F2d 1067 (1st Cir. 1986).

9. The laboratory should disclose to the employer a written test result within five working days:

All laboratory reports of a test result should, at a minimum, state;

(a) The name and address of the laboratory that performed the test and the positive identification of the person tested. *Rodriguez v. Pennsylvania Board of Probation and Parole* 516 A2d 116, (Pa. Commonwealth, 1986), *Jones v. Pennsylvania Board of Probation and Parole* 520 A2d 1258 (Pa Commonwealth 1987); 49 CFR 219.307 (c);
(b) any positive confirmed drug test results of a specimen which screened positive on an initial test, or a negative drug test result on a specimen.
(c) A list of the drugs tested;
(d) The type of tests conducted for both initial and confirmation tests and the cut-off levels of the tests;
(e) The report shall not disclose the presence or absence of any physical or mental condition or of any drug other than the specific drug and its metabolites that an employer requests to be identified. 29 USC 701 et seq.

10. Maintenance of specimens for confirmation or re-test:

Both the NIDA certification program and the CAP accreditation program specify specimen maintenance requirements. 49 CFR 219.211(d); 219.303(a)(5); 219.307(a)(2);219.305(d); 53 Fed. Reg. 11983. The laboratory industry is increasingly aware of the potential litigation problems resulting from failure to store specimens whose results could be subjected to challenge. See, *Franklin v. Office of Court Administration,* 2 IER Cases (BNA) 783 (NY S Ct. 1987), (where applicant was denied the position of court officer following a positive drug test; court ordered re-examination of application without the drug test results after

applicant was denied opportunity to have the specimen independently tested prior to its being destroyed).

11. Analysis of specimens by a reliable scientific method:

Amici's position with regard to this requirement of a legally defensible drug program has been adequately discussed in Section I of this brief.

12. Opportunity for employee to challenge the test results: Due Process:

Employees generally enjoy rights entitling them to due process protection when faced with discharge or discipline. *Joint Anti-Fascist Refugee Committee v. McGrath* , 341 U.S. 123, 168 (1951). These rights may derive from the right to contract, to engage in the common occupations of life, and maintain one's employment and standing in the community. *Bishop v Wood*, 426 U.S. 341 (1976). *Board of Regents v. Roth* , 408 U.S. 593 (1972); *Paul v. Davis* , 424 U.S. 693, 701-712 (1976). Public employees may have a property interest in continued employment if they can establish a legitimate claim of entitlement . *Board of Regents v. Roth* , at 576-77; See also, *Perry v. Sindermann*, 408 US 593 (1972). Employee due process rights can also be established by statute

or contract. *Slochower v. Board of Education*, 350 U.S. 551 (1956). The right to due process applies in public employee drug testing matters. *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (ED. Tenn. 1986), aff'd 3 IER Cases (BNA) 673 (6th Cir. May 23, 1988); *Everett v. Napper*, 833 F 1507 (11th cir 1987); *Shoemaker v. Handel*, 795 F2d 1136 (3rd Cir. 1986) cert denied, 107 S. Ct. 577 (1986); *Hester v. City of Milledgeville*, 598 F. Supp. 1456 (MD. Ga. 1984).

The basic due process requirements that apply in drug testing are; 1) notice of drug testing prior to implementation of the testing program; 2) test accuracy including having an initial test confirmed by a method of greater or equal sensitivity; 3) an opportunity for the employee who tests positive to have a hearing or other chance to contest the test results. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Gibson v. Berryhill* , 411 U.S. 564 (1973).

If an employee tests positive, the following measures should be taken:

a) Every specimen that produces a positive confirmed result should be preserved in a frozen state by the laboratory that conducts the confirmation test for a period of time after the result is mailed or otherwise

delivered to the employer. During this period, the employee who has provided the specimen, should be permitted by the employer to have a portion of the specimen re-tested, at the employee's expense. (49 CFR 219.305; 53 Fed. Reg. 11983).
b) An employee should be able to request and receive a copy of the test result report. After receiving notice of a positive confirmed test result, the employee should be able to submit information at a hearing to explain or to contest the results. 49 CFR 219.211, 219.503, 219.305;

Courts have largely upheld the accuracy of drug test results arising from programs which, like the instant FRA Regulations, comply with these twelve criteria. *Peranzo v. Coughlin,* 675 F. Supp. 102 (S.D. N.Y. 1987), *Vasquez v. Coughlin,* 118 N.Y.A.D. 2d 897, 499 N.Y.S. 2d 461 (A.D. 3 Dept, March 6, 1986), *N.T.E.U. v. Von Raab,* 816 F2d 170 (5th Cir. 1987), stay denied 107 S. Ct. 2479 (1987), cert. granted 56 U.S.L.W. 3590, February 29, 1988; *Lahey v. Kelly* 71 N.Y. 2d 135, 518 NE 2d 924, 524 N.Y.S. 2d 30 (Ct. App. 1987).

III. POSITIVE DRUG TEST RESULTS FROM A LEGALLY DEFENSIBLE PROGRAM POSE AN UNACCEPTABLE RISK TO A COMMON CARRIER

Generally, employers have a right and duty to provide employees with a safe work environment.[7] Common carriers, such as those governed by the FRA Regulations are bound by a "special duty" to protect passengers against unreasonable risk of physical harm. 2 Restatement of Torts 2d, Sec. 314A (1) (a).

Any positive drug test of an employee covered by FRA Regulations possesses an unacceptable risk to the common carrier employer. While impairment levels of drug use cannot now be predicted, no responsible scientist can deny that illicit drug use affects behavior. Chiang, *Implications of Drug Levels in Body Fluids: Basic Concepts* , 73 NIDA Research Monographs 62, 63 (1986), where the authors indicate that their studies show "most abused drugs act on the central

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7 For a general discussion of the rights and duties arising from the employment relationship see, Rothstein, Medical Screening of Workers, 81 (BNA Books 1984), where the author, at 71, suggests that a duty to screen employees for intoxicants cannot be questioned.

nervous system and produce effects on mood, perception, behavior and performance", citing, Goodman and Gilman, Pharmacological Basis of Therapeutics, (New York: McMillan & Co. (1985)); see also, Soderstrom, *Marijuana and Alcohol Among 1023 Trauma Patients*, 123 Arch. Surg. 733-737 (June 1988) (where the study showed that 34.7% of subjects tested had used marijuana); Mason and McBay, *Cannabis: Pharmacology and Interpretation of Effects*, 30 J. of Forensic Science, 615 (July 1985) (where the authors agree that perceptual, cognitive, affective and behavioral changes are produced when cannabis is ingested, but they deny that detection of impairment levels is possible); 52 NIDA Research Monograph at 102-103, 118-119, 127, 137, 142, 146 (1984)

Because forensic scientific methods can reliably detect use and because the common carrier employer is entitled to take reasonable steps to limit liability, requiring employees involved in serious or fatal accidents or those suspected of drug use to submit to urinalysis is patently reasonable.[8] See,

[8] It must be noted that, although the Ninth Circuit stated that drug testing, combined with suspicion of drug use, "should withstand scrutiny" under the fourth amendment, "subpart D" of the FRA Regulations (49 CFR §219.301, "Testing for a reasonable cause") was found to be unreasonable. 839 F. 2d 589.

Jones v. McKenzie, 833 F.2d 335 (D.C. Cir 1987). The Ninth Circuit's conclusion that drug testing was not reasonable must, therefore, be reversed.

IV CONCLUSION

Forensic scientific methods, properly employed in an otherwise legally defensible substance abuse program, are accurate and reliable. The Ninth Circuit committed reversible error when it allowed itself to become aligned with those philosophically opposed to drug testing and who ignore what drug tests can do. A determination that drug testing is unconstitutional because toxicological methods cannot determine levels of intoxication or impairment begs the question: when employee drug use is detected, what may an employer with a special duty of care do to limit his liability? Undoubtedly, drug testing is a reasonable employer response to the risks posed by employee drug use.

Those who condemn the science of drug testing because, they disagree with the manner in which individuals are selected

or disciplined may be compared to those of ancient times who found it appropriate to "kill the bearer of bad tidings." We urge this Court allow "the messenger" to live.

For the reasons set forth herein, *Amici* respectfully requests that this Court to resolve this matter in favor of Petitioner, James H. Burnley, IV, Secretary of the Department of Transportation, and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

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